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ABSTRACT

The electronic environment is currently forcing educators at all levels to revisit issues concerning intellectual property. Quick availability of information and data through the Internet has changed the way the general public views information since it seems to be in endless supply from any computer on any individual desktop. This paper presents a brief overview of several topics. The first focuses on ideas and concerns as to why faculty and institutions in education, particularly higher education, have good reasons to ask questions concerning "who owns what" in an era where educational opportunities may be delivered through the Web and various distributed learning systems. Secondly, it presents issues relevant to learner support and student ownership. Thirdly, it presents ideas about ownership that institutions might consider. Lastly it presents an overview of salient copyright changes and issues for 1998 and 1999. Selected print and online sources of additional information on intellectual property issues are also provided. (Contains 10 references.) (Author/AEF)

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Intellectual Property and Copyright: Protecting Educational Interests and Managing Changing Environments

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Intellectual Property and Copyright: Protecting Educational Interests and Managing Changing Environments

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Abstract

This paper will present a brief overview of several topics. The first is ideas and concerns as to why faculty and institutions in education, particularly higher education, have good reasons to ask questions concerning "who owns what" in an era where educational opportunities may be delivered through the Web and various distributed learning systems. Secondly it will present issues relevant to learner support and student ownership. Thirdly it will present ideas about ownership which institutions might consider. Lastly it will present an overview of salient copyright changes and issues for 1998 and 1999 and sources of additional information.

Overview

The electronic environment is currently forcing educators at all levels to revisit issues concerning intellectual property. Quick availability of information and data through the Internet has changed the way the general public views information since it is in seemingless endless supply through use of computers on anyone's desktop. Thus, faculty and students alike are faced with an endless, figurative smorgasbord of materials in varied formats. A dilemma concerning intellectual property occurs when owners' rights collide with users' rights and the public need to access and use resources. Thought provoking papers about the Internet and intellectual property are becoming available on the World Wide Web. Esther Dyson has written a book, *Release 2.0*, and several articles dealing with intellectual property on the Internet and the intellectual value of property. An article by Vincent J. Roccia presents an interesting perspective on copyright law in the United States and possible changes or clarifications needed perhaps to enhance applicability to the Internet. Current copyright laws in the United States perhaps do not quite address the Internet per se because it represents a challenge to existing law and interpretations. Burk presents a discussion of intellectual property issues and challenges presented by the "Electronic Frontier."

This paper will present a brief overview of several topics. The first is ideas and concerns as to why faculty and institutions in education, particularly higher education, have good reasons to ask questions concerning "who owns what" in a era where educational opportunities may be delivered through the World Wide Web and various distributed learning systems. Secondly it will present issues relevant to learner support and student ownership. Third, the paper will provide a brief overview of copyright legislation changes and reports which occurred in 1998 and 1999. Lastly it will present some sources of information, sample policies, and ideas about ownership of intellectual property which institutions might consider. Readers may wish to explore the listing of recommended resources for additional information.

Intellectual Property

Faculty and Institutional Concerns

Distribution mechanisms, format of materials, and traditional models of ownership are bringing increasing concerns about intellectual property development, use, and application to a new importance in academic conversations. University professors, under the old way of viewing ownership, were the single owners and authors of intellectual property with a few exceptions. However, in today's environment, ownership may be shared with several individuals or organizations as new technology encourages development of multimedia products using a variety of formats and pieces which may involve multiple layers of copyrighted materials.

The dilemma of "who owns what" is compounded when one considers matters such as how much support, use of facilities, and equipment involvement are used to produce a work using newer electronic technologies. Often the institution has invested a great deal of funds in a project or product before it is used for educational purposes. The author believes that basically four major issues concerning intellectual property need to be addressed by faculty and institutions through dialogues, policies, and communication:

1. Ownership of intellectual property
2. Rights to use intellectual property
3. Procedural issues concerning intellectual property
4. Special considerations concerning copyright

In most cases, an "audit" or checklist of what rights need to be acquired, cleared, or considered must be developed prior to design, production, and delivery of a course, for example, through the World Wide Web or through other distance learning distribution systems. Institutional personnel should think through what rights are needed for a course and what all future possible uses and distribution mechanisms of course content might be prior to release. If not accomplished prior to development, the entity could find itself having to retrace steps and renegotiate or acquire additional rights at more cost. Thus, planning ahead with a checklist approach could save a great deal of money, effort, and hassle for all involved.

Some authors and organizations have made information available which can encourage and guide discussions about intellectual property in the higher education environment. Many professional associations are discussing the issues but no definitive checklist or statement exists currently since ultimately each institution must deal with the volatile topic of intellectual property and issues concerning "who owns what" at the state or local level. A few examples of resource materials are included at the end of this paper. An interesting document entitled *Ownership of New Works at the University: Unbundling of Rights and the Pursuit of Higher Learning* by the Consortium for Educational Technology for University Systems, CETUS (www.cetus.org), suggests several points worth considering in a discussion. The group sets forth a viewpoint that simple, individual ownership of all rights which are associated with copyright may not now be the most desirable avenue as it may stifle creativity and new work unduly. Thus, it is time for higher education to revisit ownership of intellectual property in order to avoid contention, place the focus on optimal access and development of works, and reduce the emphasis on economics which often dominates discussions about intellectual property. CETUS sets forth the "three C approach," to conversations about intellectual property: creative initiative, control of content, and compensation concerning published as well as unpublished works. The approach is quite useful as it may be less intimidating and antagonistic than beginning with the economic issues and may apply more broadly to faculty engaged in producing materials but not necessarily receiving compensation for those materials.

The CETUS model for discussion, the "three C approach" presents the following points. The first point is creative initiative and poses discussion questions such as "who generated the idea for the work, whether published or unpublished, and who created the work and fixed it in a tangible medium? For example, a Department Chairperson might encourage faculty to publish but not dictate the ideas and content. The entities of initiator, creator, and fixator may not be the same. The second point for discussion deals with the control of content as to who controls creation, production, specifications, and authority for acceptance. The degree of control is something which might be negotiated. The third point is compensation and other support. The CETUS document suggests that unless the two were extraordinary--above what faculty are normally provided-- the faculty would most likely retain ownership of intellectual property they created. Again, there are many areas of negotiation under the third discussion point.

Another way of approaching ownership of intellectual property is presented in a paper by Dan L. Burk,

an attorney and Associate Professor of Law at Seton Hall University. He presents a good overview of models for copyright ownership of electronic course materials between faculty and their sponsoring institutions. His paper presents detailed discussion of advantages and disadvantages of three sets of options and two models which might be considered by universities and colleges drafting documents for copyright. Option summaries are as follows:

Option set one assumes that faculty members are to be considered authors of their work produced while employed at a University:

Option 1.1: Faculty member authors a work but assigns ownership to the University

Option 1.2: Faculty member authors a work with a non-exclusive license to the University

Option set two assumes a work-for-hire interpretation when faculty are employed by a University where authorship does not reside with the faculty member:

Option 2.1: University as the author with a non-exclusive license to the faculty member

Option 2.2: University as the author but assigns rights to the faculty member

Option set three applies if faculty creators are treated as independent contractors on a project:

Option 3.1: University as author but assigns rights or license to the faculty member

Option 3.2: Faculty as author who then assigns rights or license to the University

In summary for this section, it is important for universities, colleges, and faculty to engage in dialogue concerning intellectual property so that ownership issues are clearly defined before products are developed by institutions, faculty, and even students. There is plenty of room for negotiation but faculty must be informed about policies and participate in the development. If not, both faculty and institutions stand to lose a great deal. Creation of new intellectual property is very important and the climate must be supportive for both sides.

Student and Learner Support Issues and Concerns

Students' rights to ownership of intellectual property they develop while students or student workers at a college or university need to be considered in addition to rights of faculty. In some instances, universities and colleges lay claim to all work produced by students. This issue needs to be addressed by institutions, policies developed, and ways found to inform students as in the catalogs for the institutions.

Learner support issues for courses delivered via distributed learning technologies bring new concerns to the discussion table. Included are topics such as electronic reserves for libraries and housing of course syllabi and materials on a university computer network. The author presents questions such as the following:

1. What rights need to be acquired and cleared prior to posting course materials including syllabi and readings on a closed versus an open network? The same question applies to courses delivered via the World Wide Web and other distributed learning networks such as video conferencing.

2. Is an online class treated the same or differently than a traditional "face-to-face" class when it comes to copyright issues? Many institutions are treating an online class such as one delivered via the Web or through computer conferencing software as a closed class which must be password protected. Thus, only students actually enrolled in the class could access materials with a password and not much material could be seen by non enrolled individuals.

3. What about posting student work to a class web site? It would seem certainly that clearances

would have to be obtained from the students.

4. May students freely use materials they find via the World Wide Web for class projects? Does the format make a difference or are formats such as music, video, and graphics to be treated differently than print materials?

5. May library personnel scan articles for online class reserve systems? If so, must the network be closed except through students enrolled in a specific class?

Legal Highlights

Digital Millenium Copyright Act

Online Service Provider (OSP)

The Digital Millenium Copyright Act is now P.L. 105-304. This is a complex law which is multifaceted and contains several aspects with differing dates for compliance. An important provision is a limitation on potential financial damages that Online Service Providers (OSP's) can face in cases where they function as common carriers and allow online users access to copyrighted materials placed on the site by someone else. If OSP's comply with the new rules which became effective in October, 1998, they may escape liability and potentially large financial penalities. Readers should consult sources listed at the end of the paper for additional information. Lide presented a good summary and materials on the Web by attorneys Crews and Lutzker are very readable. The Copyright Crash Course at the University of Texas has excellent content and model policy procedures. It also contains a beta test of an online "copyright tutorial" for network users. Highlights of the law for online service providers which can include educational institutions and libraries are as follows. Institutions must implement these four points immediately to qualify for the limitation. The Library of Congress has posted information at its website.

1. An agent to receive statutory notices from copyright owners must be designated who will also send notices to affected subscribers.

2. The name and contact information for the agent must be given to the Copyright Office and posted on the OSP's website.

3. A policy for termination of repeat offenders and a method to inform network users of copyright laws and institutional policy must be developed.

4. The OSP must comply with "take down" and "put back notice requirements.

Another interesting piece of this law is a special clause regarding research and teaching employees at public and nonprofit higher educational institutions. There is a special exception to the rule that an institution is usually responsible for acts of its employees. Faculty and graduate students under employment to teach and do research will not be considered to be "the institution" for purposes of OSP according to the DMCA. With three exceptions, this clause is an "escape" for an institution when a faculty or graduate student posts infringing materials. If this clause did not exist, the institution would automatically forfeit its right to the OSP limitation.

Reproduction by Libraries and Archives (Section 108 B and C section changes)

Another part of the Digital Millenium Copyright Act was a much needed provision to update section 108 of the current Copyright Law, P.L. 105-304 Stat. 2860. For years, libraries and archives have dealt with the problem of preserving and distributing deteriorating works still under copyright protection. Current copyright law usually prohibited preservation in digital format as the works had to be preserved in "facsimile format" which was often problematic. The new provision allows libraries and archives, with certain conditions, to make up to three copies of some works for preservation and security reasons, use newer technologies for such copying and provides additional protections if a "format" becomes obsolete. A copyright notice is required to be affixed to copies if it was on the original item. In the case of

unpublished works, digital copies must remain on the premises. There are several rules which apply to these privileges and readers should consult the Crews document at the Copyright Management Center for a complete breakdown of section 108 changes.

Distance Education

In May, 1999, the U.S. Copyright Office published a report on distance education and copyright which had been mandated by the Digital Millenium Copyright Act. In October, 1998, the DMCA ordered the Copyright Office to conduct a series of hearings nationally, compile testimony, examine the issues, and make recommendations based on its study which were needed, if at all, in existing Copyright Law for distance education. The Office was given six months to do this massive job which included "response time" from interested parties. The hearings process ran smoothly and organizations and representatives for copyright owners and distance education providers such as institutions received equal time. Institutions, associations, and organizations representing distance education rallied to the challenge. Early reports about the study were mixed and it was feared that the tremendous resources of copyright owners would skew the report against distance education but this was not to be the case. The Copyright Office report proved to be responsive to the interests of copyright owners as well as users of copyrighted materials to balance use and access. It contains many recommendations and proposed copyright law revisions which address the needs of distance education. The report can be downloaded at the U.S. Copyright Office website. Readers should note that the report is not law and contains recommendations. Current law is problematic for distance education and interested parties should read the report and perhaps contact Congressional members with letters of concern or support. Some of the highlights from the report are as follows from the Crews summary document at the Copyright Management Center:

1. Expand coverage of rights to meet technological necessities.

2. Allow performances and displays in the context of "mediated instruction."

3. Expand the scope of allowed materials.

4. Eliminate the requirement of transmitting the educational experience solely to classrooms and similar places.

5. Implement safeguards to reduce risks to the copyright owners.

6. Allow retention of a copy of the distance education program on a server for duration of the course with access limited to students enrolled in the course.

7. Continue to apply fair use to activities outside the exemption for distance education.

Copyright Term Extension Act (P.L. 105-298, Stat. 2827)

This controversial law has added twenty more years of copyright protection to works which would have entered the public domain and extended copyright protection to life of the author plus seventy years. There are some library, archive, and educational institution exceptions under this law. For example, during the last twenty years of copyright protection, institutions may copy, distribute, perform, and display works in digital or facsimile form provided that it is for purposes of preservation, scholarship, or research. The institution must have determined that: the work is no longer subject to normal commercial exploitation; a copy or phonorecord can not be obtained at a reasonable price (not "rare price"); and the copyright owner or designated agent provides notice that these conditions apply.

Summary

This brief paper has set forth some ideas to provoke discussion and perhaps policy development for intellectual property issues, particularly copyright, which need to be addressed by institutions of higher education and faculty in order to maintain the flow of good materials in a changing electronic environment. Failure to discuss and address these issues may result in a curbing of creativity and much

antagonism on the parts of faculty and their institutions. Many models and points for discussion exist which can lead to successful negotiation of ownership issues. In addition, readers have read a brief overview of salient copyright legislation and reports for 1998 and 1999. Links in the resource section at end of the paper may be explored for additional information and recommendations.

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http://www.iupui.edu/~copyinfo/home.html

Dyson, Esther Intellectual Property on the Net. *Release 1.0.*
http://www.eff.org/pub/Intellectual_property/ip_on_the_net.html
no date

Dyson, Esther, Intellectual Value. *Wired*, March, 1997.
http://www.wired.com/wired/3.07/features/dyson.html

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http://www.educause.edu/ir/library/html/cem9913.html

Roccia, Vincent. What's Fair is (Not Always) Fair on the Internet. *Rutgers Law Journal*, 29:1.
http://www-camlaw.rutgers.edu/publications/lawjournal/rocciahtm.htm

Thompson, Dennis P. Intellectual Property Meets Information Technology. *Educom Review*. 34:2 p. 14-21

Resource List

Materials dealing with intellectual property globally are abundant and quite easily located via the World Wide Web. The materials selected for inclusion in this list are by no means comprehensive. Sites were selected because they provide unique information and/or links to many additional resources on a variety of intellectual property topics issues, and perspectives. Readers may follow links in the resources to obtain more information.. Sources are current as of in September, 1999.

Print Materials by the author:

Bruwelheide, Janis H. (1994). Copyright Concerns for Distance Educators, in Willis, Barry. *Distance Education: Strategies and Tools*, Educational Technology Publications.

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_____ (1997). Myths and Misperceptions, in Gasaway, Laura. *Copyright Growing Pains.*

_____(1995 reprinted with 1997 update). *The Copyright Primer,* 2nd edition. Chicago, IL: ALA Editions, American Library Association, Chicago, Il . http://www.ala.org

World Wide Web Source List:

Consortium for Educational Technology in University Systems:

CETUS Discussion Series
http://www.cetus.org

Fair Use of Copyrighted Works

Information Resources and Library Services for Distance Learners
Ownership of New Works at the University
The Academic Library in the Information Age

Copyright Crash Course, University of Texas
http://www.utsystem.edu/OGC/IntellectualProperty

Copyright Management Center: Indiana University-Purdue
http://www.iupui.edu/~copyinfo/home.html

Copyright and Universities: WWW and Gopher Sites
http://www.arl.org/scomm/copyright/UniCopy.html

Copyright Office, Library of Congress:
http://lcweb.loc.gov

NEW Copyright Basics, Circular 1
http://www.loc.gov/copyright/circs/circ1.html

Reproductions of Copyrighted Works by Educators and Librarians (circular 21)
http://lcweb.loc.gov/copyright/circs/circ21.pdf

Fair Use Center
http://fairuse.stanford.edu

Digital Millenium Copyright Information (DMCA)

Note: See also the Copyright Crash Course and the Copyright Management Center previously listed for additional interpretations of the DMCA.

American Library Association: Washington Office (select copyright)
http://www.ala.org/washoff

Educause Current Issues: DMCA Guide
http://www.educause.edu/issues/dmca.html

Sample Intellectual Property Policies in the United States:

Carnegie Mellon:
http://gollum.mac.cc.cmu.edu/univ_policy/documents/IntellProp.html

Copyright Resources Online:
http://www.library.yale.edu:80/~okerson/copyproj.html

Copyright Resources Online -- Policies
http://www.library.yale.edu:80/~okerson/copyproj.html#ucopy

Library Issues:

Electronic Scholarly Publication:
http://www.arl.org/transform/esp/index.html

Electronic Reserves:
http://www.research.umbc.edu/aok/reserve.html

Faculty Guidelines:
http://www.lib.umich.edu/libhome/Reserves/faculty/faculty.html

Liblicense:Licensing Digital Information:
http://www.library.yale.edu/~Llicense/index.shtml

Licensing:
http://www.arl.org/scomm/licensing/licbooklet.html

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Transforming Education Through Information Technologies

Abstract

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